

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
: Docket #03cv9685
MCCRAY, RICHARDSON, SANTANA, :
WISE AND SALAAM LITIGATION :
: New York, New York
: May 13, 2015
----- :
:

PROCEEDINGS BEFORE
MAGISTRATE JUDGE RONALD L. ELLIS,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs BELDOCK LEVINE & HOFFMAN, LLC
Salaam, McCray, BY: KAREN DIPPOLD, ESQ.
Richardson & Santana: 99 Park Avenue, Suite 1600
New York, New York 10016
(212) 490-0400

For the Plaintiff FISHER & BYRIALSEN, PLLC
Wise: BY: JANE FISHER-BYRIALSEN, ESQ.
ALISSA BOSHACK, ESQ.
99 Park Avenue, PH/26th Floor
New York, New York 10016
(212) 962-0848

Transcription Service: Carole Ludwig, *Transcription Services*
141 East Third Street #3E
New York, New York 10009
Phone: (212) 420-0771
Fax: (212) 420-6007

Proceedings recorded by electronic sound recording;
Transcript produced by transcription service

APPEARANCES CONTINUED:

For the Defendants: NEW YORK CITY LAW DEPARTMENT
CORPORATION COUNSEL
BY: PHILIP DEPAUL, ESQ.
GENEVIEVE NELSON, ESQ.
100 Church Street
New York, New York 10007
(212) 788-8714

INDEX

E X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re-Direct</u>	<u>Re-Cross</u>
----------------	---------------	--------------	------------------	-----------------

None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
-----------------------	--------------------	-----------	-----------	------------------

None

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

THE CLERK: This is a matter for a status conference In Re McRay, Richardson, Santana, Wise and Salaam Litigation, 03cv9685. Counsel, please state your name for the record.

MS. KAREN DIPPOLD: Karen Dippold, Beldock, Levine & Hoffman for plaintiffs Salaam, McCray, Richardson and Santana.

THE COURT: Good afternoon.

MS. DIPPOLD: Good afternoon, Your Honor.

MS. ALISSA BOSHACK: Good afternoon, Alissa Boshack from Fisher & Byrialsen on behalf of Kharey Wise and also appearing from my office by phone is Jane Fisher-Byrialsen.

MS. JANE FISHER-BYRIALSEN: (via speakerphone) Good afternoon, Your Honor.

THE COURT: Can everybody hear here?

MS. DIPPOLD: Yes.

MS. FISHER-BYRIALSEN: Thank you for the accommodations.

MS. GENEVIEVE NELSON: Genevieve Nelson, Assistant Corporation Counsel, for defendants, good afternoon, Your Honor.

MR. PHILIP DEPAUL: Good afternoon, Your Honor, Philip DePaul, also for defendants.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Okay, thank you, everyone. As I understand it, this is a planning meeting as we determine the process of de-designating discovery materials. I assume the parties had some discussions already?

MS. DIPPOLD: We have had some discussions, Your Honor, yes.

THE COURT: So only one person can remain standing and talk to me, everyone else can sit down so I can focus.

MS. DIPPOLD: Your Honor, first of all, I think that one of the things that has to happen is that the confidentiality orders that were entered provide that on the termination of the litigation the documents will either be returned to the party that produced them or they will be destroyed. So obviously there is going to have to be an order that modifies that because the parties have basically agreed that many, if not most of the documents, will be de-designated.

The City has now provided us with the 85 page chart of documents which is not done document by document with Bates numbers, but is done through categories, which presents a bit of a problem for the plaintiffs and we have discussed with defendants' counsel that, in fact, there will have to be some sort of process by which we consult with one another to agree upon the documents that are to be de-designated and the

1
2 redactions that will be required to do that. And that
3 pertains not only to the documents that are mentioned in this
4 chart, but we also have, the City says, 95, I haven't counted
5 them, but they say we have 95 depositions. And many of the
6 documents are, of course, exhibits during the course of those
7 depositions and so those depositions may also have to have
8 redactions done to them as well. so this is an enormous
9 project that involves hundreds of thousands of pages of
10 documents in all likelihood.

11 What we haven't discussed and what we feel we need
12 to discuss at this point is what will happen if, in fact, we
13 are unable to agree on how specific documents are to be
14 treated and what redactions are to be made to those particular
15 documents. The plaintiffs are hopeful that your will remain
16 available to us to help us resolve any disputes that might
17 arise during the process of de-designating documents.

18 THE COURT: Does that suggest that the defendants
19 are not hopeful that I'll stay involved?

20 MS. DIPPOLD: Well they'll have to speak for
21 themselves, Your Honor, but I think that they probably would
22 also like you to be available. And the other problem is how
23 these documents are going to be maintained and the defendants
24 are also concerned about the amount of time that's involve in
25 this is going to be enormous and the question was raised just

1
2 today whether the plaintiffs are looking to the defendants to
3 somehow compensate them for the amount of time that will be
4 involved in redacting and de-designating documents. So those
5 are the sorts of issues we've discussed. Mr. McGraw has made
6 some proposals about having a website that The Times is
7 willing to participate in, and also that perhaps the City
8 Department of Records would maintain this on a government
9 publications portal. So these are issues that we haven't yet
10 discussed with the City although we had a brief conversation
11 beforehand. So that's basically where we're at at this point.

12 THE COURT: Okay, well I guess I could start with
13 the question perhaps to Ms. Nelson, what is your, I guess the
14 plaintiffs want to have some procedure in which if there are
15 disagreements you'll be able to bring it to me for hopefully
16 resolution without delay.

17 MS. NELSON: We are also hopeful that the Court
18 retains jurisdiction so as to resolve any such issues that
19 might arise. I believe when we met and conferred with respect
20 to the chart, the plaintiffs indicated that they would need
21 additional time to review the chart in more detail, as Your
22 Honor notes and plaintiff acknowledged, it's an extensive
23 chart. So they indicated that they would want more time to
24 review just the chart and then we would have an additional
25 meeting subsequent to that with respect to any issues that

1
2 might arise.

3 We did have a discussion about whether there were
4 any documents that wholesale we could agree on, and I think as
5 a general proposition there might be, but I think that before
6 defendants commit themselves to a yes or no answer, we would
7 like plaintiffs' input as to whether there are any issues on
8 the chart that they would like to discuss in further detail.

9 THE COURT: Okay. Well --

10 MS. NELSON: Just one other issue that Ms. Dippold
11 brought up which is the suggestion by the New York Times as to
12 them assisting the City in hosting a website or whether the
13 documents should be put on a Department of Records website or
14 someplace at the Department of Records where the documents
15 could be readily available. We're of the opinion that neither
16 one of those suggestions might be ideal for us, but we are
17 having discussions, not only with our office, but we intend
18 to, once we get this resolved in our office, to contact the
19 appropriate agency regarding whether there could be some kind
20 of website location on NYC.gov perhaps where we could have
21 these documents hosted. We're still, it requires vetting from
22 many levels and we haven't, we haven't gotten through the
23 initial stages, mostly because I think part of the information
24 that we need is how much will there be and will it be on a
25 rolling basis, will it be documents, you know, all documents

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

at once as a bundle or whether they'll be rolled out in
volumes, volume I, volume II or production 1, production 2.

So I think a little more discussion is required by
the parties before we can finalize exactly how we intend to
host these documents.

THE COURT: Okay. Well let me first state something
which I assume is not going to be relevant to our
considerations, but my current term as a magistrate judge ends
in November of 2017. I assume we're not talking about
something that's going to take longer than that. I wouldn't
want to tell my wife that I have to sign a renewed term.

MS. NELSON: You can't retire because you retained
jurisdiction over this case. Your Honor, I think, all joking
aside, I think plaintiffs' estimation is about six months. The
defendants independently estimated the same amount of time.
Could it be a little more, of course, could it be a little
less, I doubt it, but we don't think that it should, as we sit
here, we do not believe that it should go until November,
2016, and I --

THE COURT: 2017.

MS. NELSON: 2017, excuse me, I make that caveat
because, as Your Honor knows, discovery in this case went on
for longer than either party anticipated.

THE COURT: Yes, I think my children were, in fact,

1
2 toddlers at the time. But that having been said, and in all
3 seriousness, obviously, because of the issues that are raised
4 by these documents and some of the issues that have been
5 decided by the Court during the course of discovery, I think
6 it's probably appropriate that I see it through to the end in
7 terms of making sure that the decisions that the parties make,
8 either you agree to them or that I weigh in on them. Because
9 aside from any issues between the plaintiffs and the
10 defendants, they're issues of the public in terms of the
11 importance of the documents that are at issue. And as a final
12 arbiter I think I still have a responsibility to make sure
13 that any documents that are of value to the public and are not
14 -- and should not otherwise be privileged, that a mechanism be
15 provided such that access can be done in a way that is
16 efficient and timely. So, yes, I will be there to break the
17 ties.

18 Now, and I appreciate when you're dealing with this
19 many documents, in particular, as Ms. Dippold pointed out, you
20 know, they may not all be in Bates order, and so I think it's
21 essential that each side knows what documents they're talking
22 about so there won't be any disagreements or any confusion
23 because one side thinks they're agreeing to one thing and the
24 other side things they're agreeing to something else. But I
25 also, I assume that the City does not disagree with that

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

notion.

MS. NELSON: No, Your Honor, I just wanted to point out that the chart was created in response to Your Honor's order which was identifying for the Court what categories and identify the documents that would fit into the categories in defendant's response to the New York Times' motion. So we started with that premise, we were over inclusive as Your Honor will see, because we wanted the Court to get real sense of the types of documents that we were talking about. We tried to eliminate as many duplications as possible, but to the extent that there were duplicate types of documents from different sources we included them in the chart.

Plaintiffs and defendants have conferred and we've talked about the possibility that there might be some documents that are not on the chart. We took a lot of time and a lot of effort to include as many of the documents that there are, but we will not foreclose the possibility that there might be a few documents that did not make it onto the chart. And if that's the case, if we locate documents that we believe are not on the chart, and we'll bring it to plaintiffs' attention and I believe they will do the same for us.

THE COURT: In that regard, one of the reasons for having you do it by topic is the hope that what I think it was

1
2 Ms. Dippold who mentioned it, but that there might be
3 categories that you could deal with as categories, and
4 therefore, instead of looking at a 1,000 documents you look at
5 a category of documents and you might be able to have some
6 agreement on that, and might facilitate some decisions which
7 don't require as many person hours. Now all of that having
8 been said, and since you are getting along so famously, what
9 is your plan for going forward in order to accomplish what
10 we've talked about today?

11 MS. NELSON: When we met last, or actually first, I
12 don't think that was our last meeting, but we've met and
13 conferred and plaintiff proposed that, as Your Honor knows,
14 there is a Court of Claims Action that's currently pending, so
15 there is some sense of urgency with getting some documents out
16 as discovery in that matter. So when we last spoke with
17 plaintiff, plaintiff suggested that they wanted to take a look
18 at the documents, document by document, to see whether there
19 is anything further that was not on the chart, as well as
20 whether they agree with what is on the chart. With that in
21 mind, defendants were more than willing to do a second, as it
22 were, second level review of the documents to make sure that
23 whatever redactions plaintiffs were making after Your Honor
24 rules on the confidentiality issues, we were all in agreement
25 with. And I think it's from that that we will then know

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

13

whether there are documents that we need to bring to Your Honor's attention. I think for the most part we are not anticipating too many of those types of dispute. If there are none, after plaintiff does their first level review, and we review them second and there are no issues, I believe those will then be not only produced in the Court of Claims matter, but will be made public.

THE COURT: Okay, so two issues. One, since you are going to be discussing these things, should we be having, maybe something near the end of the summer where we have another chat?

MS. DIPPOLD: I think that would be helpful, Your Honor. I think that at this point we really haven't focused enough on how this is going to be done. From the plaintiffs' perspective, we rather expect that we're going to have to look at all the documents, see what needs to be redacted, and then we're going to have to make sure that the defendant's counsel, that they are on the same page. That they are thinking the same way about which documents will be public and which documents will be redacted, and which ones will not be redacted. And until we get into the process of actually doing that, I don't think we can really tell. In looking at the chart, there were some documents that we think are significant that we couldn't fit into a category. So it's not going to be

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

an easy thing to do. I think we're going to have to discuss the documents in considerable detail to arrive at what is actually going to be on the website or be part of the public record.

THE COURT: Well I will say in shorthand I agree with you, I think whenever you are dealing with large volumes of information, whether it's in discovery or otherwise, when you start to get into the mechanics of doing it, then the issues start to arise. And I think getting you started is the important thing because then the issues will arise, you will agree or you'll have disagreements and you'll bring them to me and we'll get it moving rather quickly.

MS. DIPPOLD: While we were talking about documents that should be redacted, there was some concern on our part that the original motion made by The Times and the addenda that they filed, have some names on them that we think would probably be redacted if, in fact, we were preparing the documents for public disclosure.

MS. NELSON: If I may, Ms. Dippold?

MS. DIPPOLD: Yes.

MS. NELSON: I think part of the issue, Your Honor, is that the list provided in The Times' latest application to the Court, as well as in your letter, might include some information that was deemed confidential. And so the parties

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

--

THE COURT: How did that happen?

MS. NELSON: How did they come by the information?

THE COURT: Yes.

MS. NELSON: I don't know, Your Honor.

MS. DIPPOLD: I don't know, either.

MS. NELSON: But I think the point Ms. Dippold is trying to make is that that list might have to be withdrawn and maybe either filed under seal or some redactions made to it, as well as that portion of their application that includes that information. We have no objection so, you know, we join in plaintiffs' application, it's theirs, but we have no objection.

THE COURT: Okay. Well, put in writing anything that you believe ought to be done, even if it's a temporary measure, to make sure that nothing runs afoul of any --

MS. NELSON: Right, and considering it's plaintiffs' application, I believe they will be conferring with The Times, so The Times understands what our concern is.

MS. FISHER-BYRIALSEN: If I may, this Jane Fisher-Byrialsen, I think (inaudible) an understanding of an agreement on how the timing is going to work because we've been under quite a bit of pressure from the Judge in the Court of Claims to begin (inaudible) discovery because, in fact, the

1
2 order that stayed the City required that we produce all
3 discovery within 60 days and broadly we're not able to do
4 that. So perhaps if the Court would allow us to start
5 preparing the documents that we want to produce, they don't
6 want, the Attorney General's Office doesn't want everything,
7 there's certain categories that they find more productive in
8 their documents (inaudible) than others, and then allow us to
9 work with counsel, if there is agreement on both sides, as
10 this is something that should be de-designated and maybe we
11 can make some amendments or some sort of new order permitting
12 us to produce it at least preliminarily to the Attorney
13 General's Office so that we can get that case moving. I don't
14 know what the Court thinks about that.

15 THE COURT: If I understand you correctly, there is
16 information that you want to produce to the Attorney General's
17 Office and you think you may have to produce it before the de-
18 designation process could be completed.

19 MS. FISHER-BYRIALSEN: Yes.

20 THE COURT: Okay.

21 MS. FISHER-BYRIALSEN: Because, (inaudible) but we
22 do have another conference, which will be the third one, I
23 think, in the Court of Claims on June 25, and we would, you
24 know, we have produced everything that we possibly could that
25 was not designated or confidential, but we've run out of

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

things to produce and I'm not sure that Judge Marin is going to sort of remain as patient with us as he has been.

MS. NELSON: Your Honor, we were actually going to address that.

MR. DEPAUL: Yeah, we were actually going to raise that. I think with respect to the discovery in the Court of Claims actions, even if there's areas of agreement between the plaintiffs and the City on documents that can be disclosed to the AG's office, that we would still need an order from Your Honor that lifts the confidentiality designations with respect to those documents. Because as we stand here today, those documents are marked confidential under the orders and I don't think, even if we agree, that the plaintiffs can start producing.

MS. NELSON: Certainly as to the categories that we've listed, I don't believe that, I was not of the understanding that plaintiff wanted to give them those documents wholesale, but they're prevented from doing that by the confidentiality stipulations. So I was going to address Ms. Dippold's suggestion that we leave this on until the end of the summer, it might be that we have to tee up some of these documents and I believe that the bulk of what the AG's office needs, we can readily decide on, but we might have to tee those up for earlier than the end of the summer for

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

another conversation with Your Honor.

THE COURT: Well to the extent that any of these productions, either to the AG's office or otherwise, require an order, for lack of a better term, relieving you of the confidentiality order, all the parties really need to do is to agree and submit to me a form of order in the language that carves out the matter appropriately.

MS. NELSON: I'm not sure it is as simple as that, Your Honor, I believe the documents that they're looking for are some of the documents that are in this production, but the AG's office will not enter into a confidentiality agreement. So we can't produce it to them with the hopes that -- we can't produce it to them now with the hopes that those documents will remain confidential.

THE COURT: Okay, there are two issues. One is getting the plaintiffs to produce them, and the other is whether or not they have to go through the process of being de-designated first. As to the issue of whether or not the plaintiffs can produce them, all that requires is for the parties here to agree that I will relieve them of the protective order. If the City wants that agreement to wait until you've either triaged or done that designation first, that's a different issue, but as to my role in terms of relieving anyone of the constrictures of the confidentiality,

1
2 as long as the two of you agree, I think it's a fair
3 assumption that the, to the extent that there's going to be a
4 party that's going to lean toward keeping it confidential, the
5 person who is going to be most in that direction will be the
6 City.

7 MS. NELSON: I'm not sure it's the documents that we
8 are leaning towards confidentiality on, it's some of the
9 information contained in those documents. I believe we will
10 agree with plaintiffs that the documents, themselves, we can
11 lift the confidentiality, if we're just talking about a
12 document, but there's information in those documents that we
13 believe should remain confidential.

14 THE COURT: I understand. And what is the AG's
15 policy?

16 MS. NELSON: Our understanding and plaintiffs can
17 speak better to it because they've been to these conferences,
18 but it's my understanding that the AG's office has a practice
19 of not entering into confidentiality agreements, which is one
20 of the reasons why they haven't received much of the documents
21 that they require.

22 MS. FISHER-BYRIALSEN: That's correct, Your Honor.
23 We have asked them to compel them to enter the confidentiality
24 but it is not willing to do that.

25 MS. DIPPOLD: Right, initially we did ask the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Attorney General's Office to simply ask the Court to modify this and allow them to be a party to these confidentiality agreements. They would not agree to that. My understanding is that their reason for not doing that is freedom of information, public records are supposed to be available to the public.

THE COURT: But isn't that kind of circular then?

MS. DIPPOLD: I can't, it was frustrating I have to agree, but what we have found in dealing with them is that doesn't mean that they disclose documents that are protected by privileges and HIPAA, and things like that. I mean we've given them documents that were not covered by the confidentiality agreements that are protected by those statutes, and there's been no public disclosure of those documents, they're bound by law to abide by those particular privileges and privacy requirements, and they do. So what I'm not sure should happen here is whether there should be some modification of the confidentiality orders that permit us to disclose the documents to them, in particular, as opposed to anyone else, because Judge Marin has been waiting and has been very patient, and the sooner we can produce documents and proceed in that court, the better.

THE COURT: Let me, we're talking about documents that in a normal course would not be available except if there

1 21

2 was FOIA request, they don't publish them or anything?

3 MS. DIPPOLD: No, they don't publish, no.

4 THE COURT: So if they get a FOIA request, then they
5 would have to determine whether or not they're going to
6 disclose them, and if they got a request for a disclosure,
7 they have certain things that they will not disclose because
8 they're either privileged or subject to privacy. So, for
9 example, if we had some documents here that you produced to
10 them, but I had ruled that they were attorney-client
11 privilege, they would not produce those, would they?

12 MS. DIPPOLD: Their position, I have to say quite
13 honestly, is a bit of a mystery to me. But what we have, I
14 mean we have given them documents that are protected, that
15 would be sealed criminal files where charges were dismissed
16 and that sort of thing. And it's my understanding that it's
17 not their practice to disclose those things, and I'm sure that
18 if they knew that a document was attorney-client privilege,
19 they would not be disclosing those documents. But their
20 position has not been to my mind stated as clearly as I would
21 like. So it's a bit of a problem to know how to deal with
22 that situation.

23 THE COURT: Okay, well we may have to cross that
24 bridge when we come to it, but I find it to be unlikely that
25 if there were documents, government documents, let's say the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Attorney General that were private or privileged, that they would turn them over without checking with the agency who said they were private or privileged.

MS. DIPPOLD: Well one of the agencies they represent is an agency that participated in the case here, which is the DOCCS, Department of Corrections and Community Service. DOCCS has taken the position that in the Court of Claims that certain documents should not be disclosed, and it's certainly my understanding that the Attorney General's Office is going to abide by the position that they've taken, so.

THE COURT: Well FOIA requests, in general, it seems to me, have a saving provision that allows agencies not to produce documents that are otherwise privileged or have some other kind of governmental, let's say, safeguard, and that it doesn't become an issue until somebody makes a FOIA request. As long as that's the way they deal with it, I'm not sure this is a problem yet or that it can't be resolved because to the extent, I find it difficult to believe that any document that has been designated by a federal court as privileged would be disclosed by a state agency. But, you know, maybe I don't understand the supremacy clause.

MS. NELSON: Your Honor, two issues. What is presently under review is not privileged documents, per se,

1
2 but documents that were produced in discovery. Now there are
3 documents that we turned over to plaintiff where we partially
4 waived privilege in order to provide them to plaintiff in this
5 matter subject to the confidentiality agreement. Those
6 documents are very few. The majority of the documents that
7 we're talking about is not subject to a privilege. They would
8 be subject to any exception to FOIA, but I just want to point
9 out one additional issue which for us is significant. When we
10 look at a FOIA request in our office, we take the source of
11 the information into consideration. So, for instance, the
12 documents that were produced by DOCCS, once we got The Times'
13 motion to intervene, we alerted them to the fact that the
14 documents they produced to us as confidential were going to be
15 subject to, were going to be part of The Times' motion and
16 they weighed in.

17 When we produce those documents to the Attorney
18 General's Office of plaintiffs produce them to the Attorney
19 General's Office, we are the source. So the kind of analysis
20 that you would undertake if it came directly from the agency,
21 might be very different. The documents came from the City, or
22 the New York City Law Department, so you might not understand
23 the impact of those particular documents, and how the source
24 agency might view them. So I just want to mention that,
25 because to the extent we're going to give documents to the

1
2 AG's office without going through the process of deciding
3 whether they fall into one of these confidentiality categories
4 --

5 THE COURT: I think I understand, they would look at
6 the source agency, not the source.

7 MS. NELSON: Thank you.

8 THE COURT: So if they got it from the plaintiffs,
9 it's not that they got it from the plaintiffs, but if it turns
10 out that the plaintiffs have DOCCS documents, they would look
11 to DOCCS for their --

12 MS. NELSON: No, I'm actually saying the opposite.

13 THE COURT: They would look to the plaintiffs?

14 MS. NELSON: Right, because plaintiff is the source
15 that they got the document from. I'm not saying they're going
16 to do anything untoward, I'm saying that you look at the
17 source that you got the documents from and from that you make
18 your analysis as to whether it falls into an exception for
19 FOIA or not. And some documents on their face are obvious,
20 that, for instance, employment records might be obvious, even
21 if you get it from the plaintiffs, it's obvious that they're
22 not the source, some documents are not. So I just would like
23 the Court to keep that in mind in its consideration as to when
24 in this process the AG's office should get the documents. They
25 want it as soon as possible. In terms of the process that we

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

have to go through I just want Your Honor to keep that in mind.

THE COURT: Well I have no control over what the Court of Claims will want, all I have is control over perhaps triaging how it's done here.

MS. NELSON: Precisely.

THE COURT: And that is to the extent that there are categories of documents that the plaintiffs want to produce, they may be the documents we need to focus on first as to whether or not they should be de-designated.

MS. NELSON: I am in agreement with that, as well.

THE COURT: Okay, anything else, I think we're raising, it's good that we're raising issues.

MS. NELSON: Just one other matter, Your Honor, which we raised just before this meeting and I think Ms. Dippold brought it up, which is any possible compensation for plaintiffs' work in review of the documents, to the extent that there is going to be a request by plaintiffs for the City to compensate them further with respect to any review they do of those documents, the City would object.

THE COURT: Well I have not had any application from the plaintiff.

MS. NELSON: I know. But seeing as Ms. Dippold brought it up I thought I'd mention it.

1
2 THE COURT: I can only tell you what I often do when
3 there is litigation, it is often in the context of class
4 litigation, particularly when there is a contingency fee
5 arrangement. That is that sometimes I get arguments from the
6 parties who are talking about the fee, and my statement to
7 them is generally when you have litigation it doesn't end when
8 the case is, when there's a judgment, and so I always assume
9 that there is going to be additional work that's going to be
10 done. So I don't know what's going to happen here but I think,
11 look, we'll wait and see if anybody makes any applications. I
12 do think that, as I said, I think that from my, my approach is
13 that I usually think that everybody anticipates that it's not
14 going to end on a date certain, and that there will be work
15 that will be done on both sides.

16 Anything else? Okay, let's set a date.

17 MS. DIPPOLD: I do have one question, Your Honor. At
18 what point, given the language of the stipulation that
19 requires a return or destruction of the documents, does the
20 Court think it would be appropriate to modify these
21 confidentiality agreements?

22 THE COURT: I'm not sure what question you're
23 asking.

24 MS. DIPPOLD: Well, for example, in paragraph 9 of
25 the confidentiality stipulation from October of 2008, it

1
2 provides that the producing party will either have the
3 documents returned to them or they will receive a letter from
4 the party that received the documents saying that the
5 documents have been destroyed, all copies of the documents
6 have been destroyed. And since we're going to start a process
7 where we're de-designating documents and it's not clear when
8 the documents are going to be disclosed, the question I have
9 is whether the order should be modified now to provide that in
10 fact we're going to enter upon this de-designation project so
11 that we don't have an obligation to either return or destroy
12 their documents?

13 THE COURT: Well, I mean we could, although as a
14 practical matter it seems to me that with all the discussions
15 we're having, whether or not there's an actual stay on the
16 implementation of that or an implied stay, clearly I don't
17 expect anybody to act on the confidentiality stipulation as it
18 exists, otherwise there would be no point in us having this
19 conversation.

20 MS. DIPPOLD: All right.

21 THE COURT: So let us consider this to be an oral
22 stay on the implementation of that provision and so that way
23 no one is going to claim that the plaintiffs aren't following
24 through with the stipulation. Although I would say that if
25 that were to happen, let's say we didn't have the

1
2 conversation, and say that the City said, well, you didn't
3 implement this and we were having these discussions, I would
4 tell the City well you had implied we consented that they
5 wouldn't have to do it anyway, so I would not enforce it. I'm
6 sure Ms. Nelson is going to say they had no intention of
7 trying to say that you had violated that.

8 MS. NELSON: Well there might be other terms in the
9 confidentiality stip that we we're trying to enforce, but not
10 that one. I will say I think back in 2010 there was an
11 inadvertent production of some documents and we worked out an
12 agreement with plaintiffs because we understand everyone now
13 is electronic and plaintiff represented to us that the
14 documents were in a database and couldn't be returned or
15 destroyed. And so we worked out an agreement by which they
16 would isolate those documents and not use them. I don't think
17 that we would enter into any different arrangement with
18 respect to the full database with the production.

19 THE COURT: Okay. Of course the bottom line is
20 this, is that while, if we were overly literal, there would be
21 an obligation on the plaintiffs to do one of two things. In
22 the Court's view, and as the Court orders, that particular
23 provision will not be enforced but will be stayed until we
24 have resolved the issue of de-designation. Anything else?

25 MS. DIPPOLD: Thank you, Your Honor.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Ms. Nelson, you're standing up again.

MS. NELSON: I'm sorry, Your Honor. One last thing. I just want to make sure that we understand before we leave today is Your Honor's intention to rule with respect to the categories that are listed in defendant's response or would you like for the parties to work on how it would be applied to the documents and then get back to the Court?

THE COURT: Well it was my hope that the parties could make decisions based on categories and just present them to me, but if they cannot agree and they present categories to me, then I would decide those categories.

MS. NELSON: Thank you, Your Honor.

THE CLERK: The next status conference will be July 30 at 10 a.m.

MS. NELSON: Your Honor, my intention is to be out of town. As Your Honor knows --

THE COURT: Was that in favor of the 30th or against it?

MS. NELSON: Not in favor, as Ms. Daitz disclosed I think at the first conference before Your Honor, my birthday is around the 1st of August so I intend to be out of town this year on the 30th. So the week before?

THE COURT: What is my schedule? July 23 at 11 a.m.

MS. DIPPOLD: At 11 a.m.?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

30

THE CLERK: 11 a.m.

MS. NELSON: Thank you, Your Honor.

THE COURT: Okay, thank you very much, we'll be
adjourned, I hope to have only good news in the future.

MS. DIPPOLD: Thank you.

(Whereupon the matter is adjourned to July 23,
2015, at 11:00 a.m.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, McCray, Richardson, et al., Docket #03cv9685 was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature_____

CAROLE LUDWIG

Date: June 22, 2015